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NO. 84-1941

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWNS, INC., AND TOURIST ATTRACTIONS, INC.,

Appellants,

VS.

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, A STATE AGENCY, AND ROBERT ROSENBERG, DIRECTOR OF THE DIVISION OF PARI-MUTUEL WAGERING, AND RICHARD BURROUGHS, SECRETARY OF THE DEPARTMENT OF BUSINESS REGULATION,

Appellees.

MOTION TO DISMISS OR AFFIRM

JIM SMITH
ATTORNEY GENERAL OF FLORIDA

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

MITCHELL D. FRANKS
CHIEF TRIAL COUNSEL

THE CAPITOL
TALLAHASSEE, FLORIDA, 32301
(904) 488-1573

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MOTION TO DISMISS OR AFFIRM

Introduction

The appellants, holders of racetrack operating permits under Florida law, conduct horseracing contests at various tracks in Florida. These events all involve pari-mutuel gambling. Chapter 550, Florida Statutes, various sections of which are contained in the appendix to appellants' brief, prohibits the holding on Sunday of all horseracing and dogracing events involving pari-mutuel gambling. Chapter 551, Florida Statutes, regulating the sport known as jai alai, which is also associated with pari-mutuel gambling, prohibits such activity on Sunday. The net effect of Florida law is to prohibit all pari-mutuel gambling on Sunday. No other form of gambling is allowed under Florida law.

The appellants contend that the Sunday racing and gambling prohibition violates

the Fourteenth Amendment in that it is not a proper exercise of the state's inherent police power and in that it discriminates against the horseracing industry.

The appellants greatly overstate their case. The Florida Supreme Court, in this and in many preceding cases, has recognized the necessity for stricter control and regulation of gambling and racing because of the problems these activities engender. Evidence in the record supports the conclusion that such activities breed problems that ordinary commercial businesses do not. Moreover, all pari-mutuel gambling activities are treated alike under Florida law -- none are allowed to operate on Sunday. There is no evidence in this record -- nor any case law cited by the appellants -- that compels the conclusion that gambling and racing activities cannot be regulated more

strictly under the state's police power than ordinary commercial enterprises.

Accordingly, the appellees move that the Court dismiss this appeal or, in the alternative, affirm the judgment below on the grounds that: 1) the statutory proscription on Sunday racing and gambling is clearly a proper exercise of the state's inherent police power; and 2) the issues raised by the appellants do not present a substantial federal question.

Statement of the Facts and the Case

Appellants suggest at page 7 of their Jurisdictional Statement that there is no evidence in the record to substantiate the conclusion of the Florida Supreme Court that the statutes in question serve legitimate state purposes. This contention ignores the principle that a party attacking the constitutionality of a statute bears the heavy burden of proving the law's

unconstitutionality. Hodel v. Indiana, 452 U.S. 314 (1981). Where review of a state statute is sought on equal protection grounds, plaintiff's burden is to convince the court that there is no set of facts that may reasonably be conceived to justify the classification. Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), cert. denied, 103 S.Ct. 729 (1983). Although appellants may disagree with the reasoning and the conclusions of the Florida Supreme Court, at no time have they adduced facts which would arguably support, much less compel, another result.

Appellants' representation that there are no record facts supporting the decision of the Florida Supreme Court is unwarranted. A defendant and witness in this case, the Florida Secretary of Business Regulation, testified by deposition that pari-mutuel sporting events have been plagued by instances of game fixing, greyhound race

fixing, horse race fixing, bookmaking, and illegal sales of drugs and alcoholic beverages at tracks. (Appendix, infra, pages 5,6) Moreover, both the Secretary and the former director of the Division of Pari-Mutuel Wagering, testified that the horseracing industry required at least one day of rest per week for its own benefit. (Appendix, infra, pages 3,8)

This case was decided at the trial level by a summary judgment. The evidence consisted only of the depositions given by the Secretary and the division director. There were no conflicts in the testimony of these two witnesses; indeed, as the only witnesses, their testimony stands unrebutted.

Argument

I. THE APPEAL SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION BELOW AFFIRMED BECAUSE FLORIDA'S SUNDAY RACING AND GAMBLING PROSCRIPTIONS ARE A PROPER EXERCISE OF THE POLICE POWER AND THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellants' argument can be distilled into two contentions. First, appellants disagree with the Florida Supreme Court's conclusion that the Sunday racing and gambling ban serves legitimate state purposes, arguing that the court's conclusions are not supported by evidence. Second, they contend, as a matter of law, that pari-mutuel gambling activity cannot be treated differently than ordinary businesses which may operate on Sunday under Florida law. The first argument presents no federal question at all; indeed, it merely seeks to improperly shift the burden of proof from the racing and gambling interests to the state. The

second contention is wholly without supporting authority.

As to the asserted evidentiary deficiency, the record is clear that racing and gambling engender certain undesirable and unlawful collateral activities. (A 1-6) Moreover, gambling itself is a recognized social problem whose dimensions may extend from the affliction of "compulsive gambling" to the intrusion of organized crime.[1] There is no evidence to the contrary in the record of this case. Thus, the conclusions reached by the Florida Supreme Court are amply justified:

> In the instant case, it would seem that the legislature could reasonably find that the Sunday racing and betting restrictions serve several legitimate state purposes

---

[1] See, e.g., Beating the Odds: Compulsive Gambling as an Insanity Defense, 14 Conn.L.Rev. 341 (1982); Symposium, 12 Conn.L.Rev. 661, 676-679 (1980); Legalization and Control of Casino Gambling, 8 Fordham Urban L.J. 245 (1979-1980).

> which promote the public health, safety, morals, and general welfare of the citizens of the state of Florida. The restrictions serve these legitimate purposes: 1) they encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities; 2) closing such facilities on what might otherwise be the busiest day of the week could help curb the compulsive gambler syndrome; and 3) racing on less busy days means there is less opportunity for mischief that sometimes attends these events, and therefore a lighter burden on law enforcement authorities is created. Thus, we find that the statutes in question do serve legitimate state purposes.

Division of Pari-Mutuel Wagering, Department of Business Regulation, et al. v. Florida Horse Council, Inc. et al., 464 So.2d 128, 130 (Fla. 1985).

In reviewing the statutory proscription, the applicable standard is not, as appellants argue, whether the legislature's purpose or the court's conclusions were proved by evidence -- although the evidence here was certainly ample. Where necessary, a "court may hypothesize the motivations of

the state legislature to find a legitimate objective. . . ." Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980), cert. denied 449 U.S. 955 (1980). Thus, the above findings are eminently proper, and the court might well have added to them the observation that the legislature could have found that allowing gambling activities on both days of the weekend was contrary to the public welfare and unhealthy in itself. Or the court might have additionally concluded, in view of the undisputed evidence, that in the judgment of the legislature it is more beneficial to the industry to take its needed day of rest on Sunday. The racing industry rebutted neither these nor the other conclusions with a scintilla of evidence.

Here, in reviewing the statutes in question and, in particular, their "classification" of racing and gambling activities, the Florida Supreme Court

relied on the reasoning of the Supreme Court in McGowan v. Maryland, 366 U.S. 420 (1961). In McGowan, this Court approved the constitutionality of a Maryland Sunday closing law that contained numerous exceptions. The Florida court quoted the following portion of McGowan:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425 (citations and footnote omitted). Certainly if Florida's objective is to discourage gambling on both days of the weekend and to lighten law enforcement burdens, a Sunday ban would be effective. By no means can it be said that the ban is

"wholly irrelevant to the achievement of the State's objective." McGowan, supra, at 425.

The above portion of the McGowan opinion compels the conclusion that the racing industry, and more broadly the pari-mutuel gambling interests, can be classified together and treated differently from more traditional, non-gambling businesses. Appellants cite no case, state or federal, holding that gambling activities cannot be classified or regulated more strictly than other businesses. They advance no fact or argument which would even tend to show that classification of pari-mutuel gambling activities is invidious, arbitrary or irrational. See, Clements v. Flashing, 457 U.S. 957 (1982).

Appellants' discussion of past litigation over various Florida laws or local ordinances requiring Sunday closing misses the mark for precisely the reason that

those cases dealt with discrimination among businesses of essentially similar character. Appellants do not refer the Court to the numerous Florida cases holding that gambling is "inherently dangerous to society" and may be suppressed altogether under the police power. Schultz v. State, 361 So.2d 416 (Fla. 1978); Rodriquez v. Jones, 64 So.2d 278 (Fla. 1953); Hialeah Race Course, Inc. v. Gulf Stream Park Racing Ass'n, Inc., 37 So.2d 692 (Fla. 1952). Federal courts too have recognized that gambling is "traditionally suspect in our society" and "plainly open to the strictest kind of supervision." Medina v. Rudman, 545 F.2d 244, 251 (1st Cir. 1976).

Appellants blandly suggest that "Florida has a public policy of allowing businesses, no matter what the nature or purpose of the business, to operate . . . and open its [sic] doors to the public whenever it [sic] elects. . . ." (Brief at

11) This is wholly unsupported by the record or by Florida case law. The inherently suspect nature of gambling cannot be effaced by inappropriate and simplistic analogies to categorically different business activities.

Conclusion

Appellants' arguments raise no substantial federal question. A state unquestionably has the right to suppress gambling altogether or to subject it to the strictest regulation where it is allowed. The time and frequency of gambling operations are of obvious concern to a state. No basis in law or reason has been shown for restricting a state's regulatory authority over gambling and limiting it to what it may exert over common occupations.

For the foregoing reasons, the appeal should be dismissed or the decision of the Florida Supreme Court affirmed.

Respectfully submitted,

JIM SMITH
Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel

LOUIS F. HUBENER
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion to Dismiss or Affirm has been deposited in the United States mail, first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court and to Wilbur E. Brewton and James Riley Davis, Taylor, Brior, Buker and Greene, 225 S. Adams, Suite 250, Tallahassee, Florida 32301, this 16th day of July, 1985. I FURTHER CERTIFY that the foregoing Motion to Dismiss or Affirm was served within thirty (30) days of the receipt of the appellants' jurisdictional statement as required by Supreme Court Rule 16.1.

Louis F. Hubener

Louis F. Hubener

SWORN TO and SUBSCRIBED before me, this 16th day of July, 1985.

Lucie C Barrett

Notary Public

Notary Public, State of Florida
My Commission Expires June 26, 1988
Bonded Thru Troy Fain - Insurance, Inc.

APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

FLORIDA HORSE COUNCIL, INC., et al.,	:	
Plaintiffs,	:	
vs.	:	CASE NO. 83-43878
	:	Div. 9
DIVISION OF PARI-MUTUEL WAGERING, et al.,	:	
Defendants.	:	
	:	

THE DEPOSITION OF: GARY RUTLEDGE

TAKEN AT THE INSTANCE OF:	The Plaintiffs
DATE:	Friday, June 15, 1984
TIME:	Commenced at 11:15 a.m. Concluded at 11:45 a.m.
PLACE:	725 South Bronough Street Tallahassee, Florida
REPORTED BY:	MARY ALLEN NEEL Shorthand Reporter Notary Public in and for the State of Florida at Large

* * *

CROSS EXAMINATION

BY MR. HUBENER:

Q If the Sunday prohibition on racing were removed, say, held invalid or otherwise removed, would that mean that horse racing would be permitted on a seven day a week basis?

A My understanding is that because of the limitation on the number of days that permit holders can run, that they would not -- it might be conceivable that they could operate seven days of the week, but it would not seem very practical, because there would still be the same number of total days that they could run.

So, if they ran seven days of the week, arguably, they would then be closed other whole weeks and forego logically profitable days of operation. So, while they legally could maybe operate for seven days of the week during certain periods of

time, they would use up their days. And it would not make economic sense to the permit holders of the state for that to happen.

A Well, in your opinion, would the effects, economic or otherwise, be positive if the tracks were to remain open and run seven days a week?

A I don't think that it would be a good thing for the tracks to operate seven days a week. I think it would be preferable for them to operate six days a week, or maybe occasionally, as in the case of the summer, to operate maybe as few as five days a week.

Q So you think it would be desirable that there be at least one closing day a week, whether --

A I think that's desirable.

Q -- by law or otherwise?

A I think that's desirable, yes.

* * *

Q In your previous position as Division Director and in your current position as Department Secretary, do you receive reports of such things as criminal activities or arrests that go on at the race tracks?

A We would receive, yes, some of that information, certainly.

Q Could you generally describe the information you receive?

A Well, there would be different mechanisms for us to become aware of it. All tracks, as far as I know, have a policy where they might choose to exclude someone. And included in the reasons they might choose to exclude someone would be because of either their criminal history or a criminal or other act that took place at the facility. And we would receive notification of those exclusions in the little reports that are filled out on them.

If there is criminal activity particularly related to the actual sport, we would generally be involved with either the law enforcement agency involved or the track management, or other persons in terms of monitoring that. We have had occasions where that situation presented itself.

And then the greatest number would be knowing on the front end, because we fingerprint all licensees and get those criminal histories and see whether or not they're qualified to be licensed. So we would have access to that information, which may or may not on occasion involve a history of some criminal act that took place at a facility.

Q What specific kinds of criminal activities have been reported?

A Well, that would be, with the number of facilities and the number of people involved, a real large range. I guess

related to the industry, there have been criminal acts relating to game fixing, greyhound race fixing or horse race fixing, that type of activity. That's probably the most serious area. Of course, occasionally there's bookmaking activity or something down the range, including maybe the sale of alcohol to a minor.

Q What about the sale of drugs at tracks? Has that been reported?

A Yes. We've had that activity reported and action taken, yes.

There's a lot more, a lot many other types of activity that would report -- that would happen, because of the fact that you've really got a living environment, particularly at horse tracks. So, you've got the same types of activity that could take place there that could take place in any community.

* * *

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

FLORIDA HORSE COUNCIL, INC., et al.,	:	
Plaintiffs,	:	
vs.	:	CASE NO. 83-43878
	:	Div. 9
DIVISION OF PARI-MUTUEL WAGERING, et al.,	:	
Defendants.	:	
	:	

THE DEPOSITION OF: ROBERT M. SMITH

TAKEN AT THE INSTANCE OF:	The Plaintiffs
DATE:	Friday, June 15, 1984
TIME:	Commenced at 11:45 a.m. Concluded at 12:10 p.m.
PLACE:	725 South Bronough Street Tallahassee, Florida
REPORTED BY:	MARY ALLEN NEEL Shorthand Reporter Notary Public in and for the State of Florida at Large

* * *

* * *

Q If racing should be permitted on Sunday, and if the number of allotted racing days remains as it is now, would you conclude that permit holders, I suppose, or tracks would have one day set aside when they would not race?

A Yes, sir, I would conclude that. At least one.

Q So instead of the State setting aside a day of rest, you think that would be done anyway by the tracks or the permit holders?

A I'm not saying that the Department of Business Regulation wouldn't choose to be involved in that from a regulatory point of view. But experience clearly dictates that the industry would close at least one day a week. At the present moment, I believe they're operating only five days a week.

* * *